BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM E. SMITH	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 160,203 & 169,519
	)	
EXCEL CORPORATION	)	
Respondent	)	
	)	
AND	)	
	)	
SELF INSURED	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

ON the 1st day of February, 1994, the claimant's application for review by the Workers Compensation Appeals Board of Awards entered by Administrative Law Judge Thomas F. Richardson dated December 22, 1993, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, James T. McIntyre, of Wichita, Kansas. The respondent, a self-insured, appeared by its attorney, David J. Rebein, Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Gary Hathaway, of Ulysses, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Awards of the Administrative Law Judge dated December 22, 1993, is hereby adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Awards of the Administrative Law Judge dated December 22, 1993, are herein adopted by the Appeals Board.

ISSUES

Docket Nos. 160,203 and 169,519 were consolidated for trial purposes by the Administrative Law Judge on the motion of the claimant. The Administrative Law Judge, however, entered separate awards for each docket number. The Appeals Board also will consolidate the two docket numbers for findings of fact and conclusions of law but will also make separate awards for each docket number.

The issues presented at oral argument for decision by the Appeals Board were:

(1) What is the nature and extent of claimant's disability in Docket Nos. 160,203 and 169,519?

(2) What is the liability of the Kansas Workers Compensation Fund, if any, in Docket No. 169,519?

All other issues presented for decision before the Administrative Law Judge in both docketed cases are hereby adopted by the Appeals Board and incorporated by reference as if specifically set forth herein. These findings include claimant's average weekly wage in the amount of $331.07 in Docket No. 169,519.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals makes the following findings of fact and conclusions of law:

Docket No. 160,203

(1) On October 8, 1988, the claimant, William E. Smith, while in the performance of his job duties of "shag truck driver" for the respondent, Excel Corporation, sustained a disabling injury to his right shoulder. As a result of such injury, claimant was unable to return to a job earning a comparable wage and is, therefore, entitled to a sixty-three percent (63%) permanent partial general work disability.

At the time the claimant injured his right shoulder, he was 58-years old and had been employed by the respondent since April 7, 1980. He is a high school graduate with

no further training or education. Prior to his employment with the respondent, the claimant had 30 years of truck driving experience.

The "shag truck driver" job consisted of operating a truck cab moving trailers from the wash rack to the dock to load with meat products. After the trailers were loaded, claimant moved them to the lot for pick up. In order to raise and lower the trailers, he had to reach a lever in the back of the truck cab with his right arm. The lever on his truck cab was wearing out which forced him to grab the steering wheel and push as hard as he could to activate the hydraulic lift. The claimant was in the process of pushing the lever on the day in question when he felt a sharp pain in his right shoulder. He immediately reported the injury to the company nurse, who then treated claimant's shoulder with conservative treatment in the form of Ultrasound for a short period of time before referring the claimant to a physician.

After claimant was treated conservatively by two local physicians without success, the respondent referred the claimant to Dr. Watts, an orthopedic surgeon in Wichita, Kansas. Dr. Watts diagnosed a rotator cuff tear in the claimant's right shoulder and on June 12, 1990, performed open surgery to repair the tear. As a result of this injury, claimant was off work and received temporary total disability benefits from June 5, 1990, through August 13, 1990, and for five days from August 31, 1990, through September 6, 1990.

Dr. Watts left his practice in Wichita, Kansas, in August of 1990. Subsequently, the claimant's medical treatment was transferred to David A. McQueen, M.D., an orthopedic surgeon in the same medical group. Dr. McQueen first saw the claimant on August 30, 1990. At that time Dr. Watts had returned claimant to work with restrictions not to use his right arm. During that visit, claimant complained of pain in his right shoulder and had restricted range of motion. As a result of this examination, Dr. McQueen diagnosed a recurrence of right rotator cuff tear. It was Dr. McQueen's opinion that the recurrent tear was not work related and could have been the result of physical therapy.

Dr. McQueen released the claimant on April 21, 1991, with permanent restrictions to the right upper extremity of no lifting over 15 pounds and no working above shoulder level. He rated the claimant in reference to functional impairment at twenty-five percent (25%) to the right upper extremity which he converted to a fifteen percent (15%) functional whole body impairment. Dr. McQueen opined that further surgical intervention or physical therapy would not be of benefit to the claimant's right shoulder. He recommended nonsteroidal anti-inflammatory medication and intermittent steroid injections as needed for future medical treatment.

The record in this case is unclear as to the specific jobs that the claimant worked and the time period he worked these jobs between the date of his first injury to his right shoulder of October 8, 1988, and the date of his second injury which was to his left shoulder in September of 1991. The evidence does establish that claimant did not return to his regular job of "shag truck driver" as such job was eliminated by the respondent by

subcontracting the job out to an outside contractor. Between October 8, 1988, and the date of claimant's first operation of June 12, 1990, the record generally indicates that the claimant worked on a regular job of "tray forming." The "tray forming" job consisted of operating a box forming machine that required the employee to push flat bundles of boxes weighing approximately 700 pounds down a conveyor to load four box forming machines. The employee is then required to take the formed box from each of the four machines and place these on another conveyor line. This is a fast, repetitive job which also required the employee to use in excess of 35 pounds of force to move the flat bundles of boxes to the box forming machines. After the claimant's first operation, he returned to a light duty job that only required him to carry papers from the shipping department at one end of the plant to the billing office at the opposite end of the plant.

Even though claimant returned to a light duty job of running papers, his right shoulder continued to be symptomatic. He particularly had difficulty with abduction and external rotation movements. Respondent, because of the claimant's continuing complaints, referred the claimant to Guillermo Garcia, M.D., an orthopedic surgeon, in Dodge City, Kansas, for examination and treatment on May 16, 1991. Dr. Garcia found a rather large osteophyte of the right clavicle which appeared to be impinging on the rotator cuff. Arthroscopic surgery was performed by Dr. Garcia on June 4, 1991, which consisted of shaving off scar tissue, removing some of the bone spur and removing other tissues such as a free tendon found floating in the shoulder area. Claimant was sent to physical therapy for shoulder rehabilitation for a six to eight week period. Dr. Garcia followed the claimant until August 28, 1991, when he opined that even though the claimant showed very little improvement as far as pain is concerned, he had reached maximum medical improvement. Dr. Garcia permanently restricted the claimant to avoid working at or above right shoulder level, weight lifting and pushing was limited to 20 pounds, no repetitive motions with the right upper extremity and no shoveling or sweeping. Dr. Garcia, in consultation with the AMA Guides, opined that the claimant has a ten percent (10%) functional impairment to his right shoulder. He did not convert this impairment rating to a body as a whole rating. With regard to future medical, no further surgical intervention was anticipated, however, claimant could require occasional over-the-counter anti-inflammatory or pain medication to control discomfort.

Claimant returned to work following this second right shoulder surgery on July 8, 1991, to the job classification of "tray former." Claimant testified that he performed this job primarily utilizing his left arm because of the permanent restrictions placed on the use of his right arm by Dr. Garcia. After approximately one month, claimant's left shoulder became symptomatic. As he continued to work his left shoulder became increasingly worse. Claimant expressed his opinion that he injured his left shoulder as a direct result of performing the job requirements of the "tray former" position with his left arm because he was not able to use his right arm.

Because of claimant's complaints regarding his left shoulder, respondent referred claimant for treatment to C. Reiff Brown, M.D., an orthopedic surgeon, in Great Bend, Kansas. Claimant was first examined by Dr. Brown on January 10, 1992. Dr. Brown

examined both the claimant's right and left shoulder during that visit. He reviewed previous radiographs and medical records along with radiographs taken at his office of both shoulders. With respect to the right shoulder, Dr. Brown found that claimant had suffered a rotator cuff tear in a work related accident in October of 1988. Dr. Brown also was of the opinion that claimant's work activities would not have caused the rotator cuff tear, if preexisting advanced degenerative problems had not existed in the right shoulder area. No further surgery was recommended for the right shoulder but he recommended the need for supportive treatment of anti-inflammatory medications, periodic injections, and for acute flare-ups occasional physical therapy. Dr. Brown found a thirty percent (30%) permanent partial functional impairment of the right upper extremity which he converted to a twenty percent (20%) permanent partial impairment of the body as a whole. Permanent work restrictions were assessed to avoid use of the right arm above chest level, lifting 20 pounds above waist level, lifting 15 pounds above chest level, avoid repeated manipulative movements of the right shoulder above 45 degrees flexion and 45 degrees abduction.

Claimant was seen again by Dr. Brown for treatment of his left shoulder problems on May 19, and June 23, 1992. Respondent, at that time, had taken claimant off of the "tray forming" job and placed him on a light duty job of carrying sheets of paper from one part of the plant to another. However, even with this decreased activity, claimant had increased symptoms and his left shoulder's range of motion was markedly limited. Dr. Brown's diagnosis was tendinitis and possibly adhesive capsulitis involving the left shoulder. Dr. Brown commenced a conservative treatment program in the form of anti-inflammatory medication and physical therapy. He originally suggested injections of anti-inflammatory steroid medication into the shoulder joint. Claimant rejected this procedure because he had injections in his right shoulder which caused so much pain he decided he was not going through that type of treatment again.

Dr. Brown last examined claimant on June 23, 1992, when he opined that claimant had met maximum medical improvement. At that time, claimant complained of no improvement in his condition. However, physical therapy had improved his range of motion in the left shoulder. Dr. Brown assigned a sixteen percent (16%) permanent partial impairment of function to his left upper extremity which he converted to a seven percent (7%) body as a whole rating. Concerning permanent working restrictions, Dr. Brown opined that claimant should avoid repeated use of the left arm above shoulder level, no lifting of any weight above shoulder level and limiting his single lifting to 25 pounds at trunk level.

At the request of his attorney, the claimant was examined and evaluated by Joe L. Dickerman, D.O., a family practitioner and occupational physician, on October 30, 1991, March 10, 1992, and October 1, 1992. During the October 30, 1991, examination, the claimant's complaints were confined to his right shoulder. Dr. Dickerman diagnosed at that time impingement syndrome, possible nerve entrapment and possible glenoid tear of the right shoulder. He recommended an MRI and EMG for further diagnostic findings because of the degree of pain that the claimant was experiencing in the right shoulder.

The claimant complained of discomfort and pain in both his right and left shoulder during the March 10, 1992, examination. In regard to the right shoulder, the claimant had significantly limited range of motion and had considerable tenderness over his surgical scar. Dr. Dickerman had the benefit of an MRI at this examination which revealed a considerable amount of scar tissue caused by repetitive tearing of the muscle. Dr. Dickerman opined that the repetitive tearing of the muscle was caused over a period of time by the claimant's work activities of a "shag truck driver" during his employment with the respondent. Concerning treatment of the left shoulder, Dr. Dickerman recommended possible acromialplasty or decompression surgery.

Dr. Dickerman, on October 1, 1992, evaluated the claimant in regard to his bilateral shoulder complaints. With respect to the claimant's right shoulder, he was still having sharp pains over the acromion and surgical incision. His limited range of motion with the right shoulder remain the same. The pain and discomfort had improved from the October 30, 1991, examination inasmuch the claimant was sleeping better as far as the right shoulder was concerned. During that evaluation, the increased symptomatology and limited range of motion in the left shoulder was the claimant's main concern. Claimant was unable to sleep during the night as a result of the pain in his left shoulder. Sleep was accomplished only an hour at a time without waking up. Vanquish and Motrin were being taken by the claimant for the pain and continuing discomfort.

In accordance with the AMA Guides, Third Edition, Dr. Dickerman assigned a fifteen percent (15%) functional impairment to the body as a whole in reference to the claimant's right shoulder injury and a fourteen percent (14%) functional impairment to the body as a whole for his left shoulder injury. Utilizing the AMA Guides, Third Edition, Combined Values Chart, Dr. Dickerman concluded that claimant's body as a whole functional impairment as a result of his bilateral shoulder injuries was twenty-seven percent (27%).

Permanent work restrictions were assigned by Dr. Dickerman for both shoulders as follows:

(1) Lifting on an occasional basis of no more than two times per hour of weight up to 10 pounds;

(2) No overhead lifting;

(3) No working overhead; and

(4) Driving of an automobile should be limited to one to one-and-one-half hours at one given period of time.

Jim Molski, vocational rehabilitation consultant, testified on behalf of the claimant concerning the reduction in claimant's ability to perform work in the open labor market and to earn comparable wages. Mr. Molski personally interviewed claimant on September 13,

1991, and issued reports dated February 14, 1992, and March 9, 1992, in reference to such interview regarding claimant's injury to his right shoulder. Mr. Molski obtained information from the personal interview with the claimant in regard to the claimant's education, vocational training, work history and current status of medical treatment. He also had available to him medical records of Dr. Garcia, Dr. McQueen, and Dr. Brown, which contained permanent work restrictions that had been placed on the claimant concerning his right shoulder injury. Utilizing his education, personal experience and knowledge, along with the Dictionary of Occupational Titles, Labor Market Access Plus 1992 computer program, he formulated his opinion on claimant's loss of his ability to perform work in the open labor market and to earn comparable wages.

Taking into consideration Dr. Garcia's, Dr. McQueen's, and Dr. Brown's work restrictions, and using a nine county area in southwest Kansas as the claimant's open labor market, Mr. Molski is of the opinion that claimant's ability to perform work in the open labor market has been reduced by eighty to ninety percent (80-90%) as a result of his right shoulder work related injury. In addition, using a pre-injury wage of $570.52 per week compared to a post-injury wage of $297.10 per week, the claimant has lost forty-seven and nine-tenths percent (47.9%) of his ability to earn comparable wages.

The Administrative Law Judge in Docket No. 160,203 found that as a result of the claimant's accidental injury which occurred to his right shoulder on October 8, 1988, while employed by the respondent, the claimant suffered a fifteen percent (15%) permanent partial general disability on a functional basis. The Administrative Law Judge found that even though the claimant was not offered a job at a comparable wage until August 20, 1992, almost four years after his injury to his right shoulder, that he is not entitled to work disability. He found that the claimant voluntarily removed himself from the respondent's employment by refusing to accept employment at a comparable wage. Therefore, the claimant would only be entitled to functional impairment.

Claimant argues that as a result of his right shoulder injury, his ability to perform work in the open labor market has been reduced by sixty-five to seventy percent (65-70%). In addition, his ability to earn comparable wages has been reduced by forty-seven and nine-tenths percent (47.9%). It is his position that these work disability figures are uncontradicted evidence that has been presented by the claimant through the testimony of vocational rehabilitation consultant, Jim Molski. However, with respect to the claimant's proposed sixty-five to seventy percent (65-70%) loss of labor market access figure, the claimant has misread Mr. Molski's report of March 9, 1992. The sixty-five to seventy percent (65-70%) figure is Mr. Molski's loss of comparable wage percentage that compares the claimant's pre-injury weekly wage to a post-injury minimum weekly wage figure. Mr. Molski's open labor market loss opinion is contained in his report dated February 14, 1992, which contains an eighty to ninety percent (80-90%) loss of claimant's ability to perform work in the open labor market.

Respondent contends that the claimant is not eligible for work disability for either his right or left shoulder injury because he declined an offered position earning a comparable

wage. Additionally, work disability is not available to the claimant in reference to the "shag truck driver" job because it was eliminated by Excel for business reasons. The respondent further argues that the claimant cannot return to the "shag truck driver" job because of this elimination, not because of his injury.

Upon review of an Administrative Law Judge's Award, the Appeals Board has the authority to increase or diminish an award of compensation. See K.S.A. 44-551b(b)(1). The question that has to be first addressed in Docket No. 160,203, date of accident October 8, 1988, is whether the claimant is entitled to benefits based upon functional impairment, or work disability as provided by K.S.A. 1987 Supp. 44-510e(a).

The parties stipulated that the claimant's average weekly wage or pre-injury wage was $613.95. Also, the parties during oral argument of this appeal agreed to the Administrative Law Judge's finding in Docket No. 169,519, that claimant was earning $331.07 after he returned to work following the second surgery on his right shoulder in September of 1991. Accordingly, the presumption of no work disability contained in K.S.A. 1987 Supp. 44-510e(a), does not apply as the claimant did not engage in work for wages comparable to the average gross weekly wage that he was earning at the time of his injury. Thus, any permanent partial general disability shall not be less than the percentage of functional impairment. See also K.S.A. 1987 Supp. 44-510e(a).

The Appeals Board finds that the appropriate functional impairment rating for the claimant's right shoulder injury should be determined by averaging Dr. Brown's twenty percent (20%) rating with Dr. McQueen's fifteen percent (15%) rating, entitling the claimant to a seventeen and one-half percent (17.5%) permanent partial general functional disability, if this rating exceeds the appropriate work disability percentage.

The respondent argues that since claimant could return to his job as "shag truck driver" were it not eliminated for business purposes that such job should not be taken into consideration when determining whether the claimant is entitled to work disability. The Appeals Board disagrees, as the facts in this case have firmly established that as a result of a work related accident claimant has suffered a permanent injury to his right shoulder. As a result of such injury, he has severe permanent restrictions that have been placed on him by four different physicians that would preclude him from performing the job duties of the "shag trucker driver." Specifically, the claimant would not be able to exert the force necessary to activate the hydraulic lever that injured his right shoulder in the first instance.

The Appeals Board finds and concludes, based on the whole record, that the claimant's ability to perform work in the open labor market has been reduced by eighty percent (80%). This percentage is arrived at from Mr. Molski's uncontradicted labor market loss percentage opinion of eighty to ninety percent (80-90%). Uncontradicted evidence which is not improbable or unreasonable and unless shown to be untrustworthy cannot be disregarded and should be ordinarily regarded as conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978). With regard to claimant's ability to earn comparable wages, the Appeals Board finds that the claimant's

pre-injury average weekly wage of $613.95 should be compared with $331.07, the weekly wage found by the Administrative Law Judge as the claimant's average weekly wage after the second right shoulder surgery. Utilizing these weekly wage figures, the claimant's ability to earn comparable wages has been reduced by forty-six percent (46%). Pursuant to the Hughes formula, giving equal weight to each of these factors, the claimant is entitled to a sixty-three percent (63%) permanent partial general disability award based on work disability for his right shoulder injury. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

Docket No. 169,519

(1) Following the claimant's second right shoulder operation, he was returned to active employment with the respondent in the job of "tray former." During the performance of these job duties, the claimant sustained a work related injury to his left shoulder and as a result suffered a twelve and one-half percent (12.5%) work disability.

As previously set forth in detail in the foregoing opinion in Docket No. 160,203, following the claimant's second operation on his right shoulder, he was released by Dr. Garcia with permanent restrictions concerning the use of his right shoulder. The claimant primarily performed the job duties of "tray former" with his left upper extremity because of these restrictions which resulted in him injuring his left shoulder. He continued to perform the "tray former" job over a four month period with increased symptoms. Finally, on January 10, 1992, the respondent referred claimant to Dr. Brown for treatment of the left shoulder. Additionally, the respondent, at that time, removed the claimant from the "tray former" job transferring him to a temporary light duty job. Dr. Brown treated the claimant conservatively and finally released the claimant from treatment on June 23, 1992, with permanent work restrictions in reference to the use of his left arm and shoulder.

The respondent has a policy to return work related injured employees to temporary light duty jobs until they reach maximum medical improvement and, if applicable, have been given permanent work restrictions. Employees are then afforded the opportunity to select a job that they can perform within their permanent restrictions which is either presently open or is occupied by an employee with less seniority. If there is a job available for the employee under the foregoing conditions and the injured employee refuses to transfer to such job, then the respondent will terminate the injured employee.

Following Dr. Brown releasing the claimant on June 23, 1992, Susan Stephens, workers compensation coordinator for the respondent, toured the respondent's meat packing plant with the claimant and a committee composed of herself, union business agent, claimant's foreman, assistant human resources supervisor, and the plant nurse. The purpose of the tour was to locate a permanent budgeted job that the claimant had the ability to perform within Dr. Brown's permanent work restrictions.

Prior to such tour, the claimant notified Ms. Stephens that he was not interested in jobs located in either the yard, hide room, or cooler. The evidentiary record does not

reflect whether jobs were available in these areas that the claimant was capable of performing or whether he had sufficient seniority to bump into occupied jobs. Only two jobs were found that the claimant could perform within his permanent work restrictions and were occupied by employees who had less seniority than the claimant. The jobs were classified as "contamination report jobs," both located on the kill floor, one at the gut table and one at the trim rail. The job duties were similar in that the employee was required to record instances where contaminated pieces of meat or internal organs were identified by the U.S.D.A. Inspectors. The basic physical requirements of the job were that employee had to be able to stand and hold a clipboard to complete the contamination report.

As a result of the tour, respondent offered the claimant the two contamination report jobs and the claimant refused to transfer to either one of these jobs. Both jobs paid $8.39 per hour plus fringe benefits, working 40 hours per week with eligibility for overtime. At that time, claimant was earning $8.09 per hour plus fringe benefits, but only working a 36 hour week. Claimant would not transfer to either of the contamination report jobs because he refused to work in the "blood and guts." When he was on the tour he thought he was going to pass out from the smell and wading through the mess.

Because the claimant refused to transfer to either of these jobs, his employment was terminated by the respondent on August 20, 1992. At the time of the regular hearing held on October 19, 1992, claimant was drawing unemployment benefits and seeking employment at a job that he could perform within his permanent work restrictions.

In the instant case, the claimant, after reaching maximum medical improvement, refused to transfer to a job that he was capable of performing within his permanent work restrictions and that paid a comparable wage. The initial question that has to be answered in reference to the claimant's left shoulder injury is whether the presumption of no work disability applies to this claimant. K.S.A. 1990 Supp. 44-510e(a) in pertinent part states:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.)

If the claimant would have accepted one of the contamination report jobs, he would have earned a wage comparable to the wage he was earning at the time of his second injury involving the left shoulder. However, the claimant refused to transfer to the comparable wage jobs and was subsequently terminated by the respondent. Thus, he did not engage in any work for wages comparable to the average gross weekly wage that he was earning at the time of the injury to his left shoulder. Accordingly, the Appeals Board finds that since the claimant, in the case at hand, did not engage in work at a comparable wage after the injury to his left shoulder as specified by the statute, the presumption of no work disability does not apply to the claimant.

Having found that the presumption does not apply, the next question is to what extent has the claimant's ability to perform work in the open labor market and to earn

comparable wages been reduced, taking into consideration the claimant's education, training, and capacity for rehabilitation. K.S.A. 1990 Supp. 44-510e(a). After the claimant's termination on August 20, 1992, Jim Molski, vocational rehabilitation consultant, re-interviewed the claimant on September 17, 1992, concerning this question. Also made available to Mr. Molski were medical reports from Dr. C. Reiff Brown, claimant's treating physician for his left shoulder injury, which contained Dr. Brown's permanent work restrictions. Mr. Molski noted that with the additional restrictions placed on the left shoulder, the claimant is very limited in regard to lifting capacity and now only has use of both his upper extremities below the shoulder level. Mr. Molski concluded that this additional limitation to the left upper extremity would diminish the base of jobs that were available after his right shoulder injury by twenty-five percent (25%). In reference to claimant's reduction in his ability to earn comparable wages, this would range anywhere between forty and seventy percent (40-70%). Mr. Molski was of the opinion that the claimant's best opportunity for employment would be at or near minimum wage.

The Administrative Law Judge in Docket No. 169,519 found that as a result of claimant's accidental injury which occurred to his left shoulder on September 1, 1991, while employed by the respondent, the claimant suffered a ten percent (10%) permanent partial general disability on a functional basis. No work disability was found by the Administrative Law Judge because the claimant had refused to accept employment at a comparable wage with the respondent. He goes on to reason that one of the goals of the Kansas Workers Compensation Act is to return injured employees to employment at a comparable wage, and claimant's voluntarily refusal to accept this benefit disqualifies him from receiving a work disability. Therefore, the Administrative Law Judge reasons that the claimant is only entitled to a disability based upon his functional impairment.

As to claimant's left shoulder injury, the Appeals Board finds and concludes, based on the whole record, that claimant's ability to perform work in the open labor market has been reduced by twenty-five percent (25%). This percentage is found in Mr. Jim Molski's uncontradicted opinion that claimant's additional labor market loss due to his left shoulder injury is twenty-five percent (25%). With respect to the claimant's ability to earn comparable wages, the Appeals Board finds that the respondent offered the claimant a job that he had the ability to perform within his permanent restrictions earning a comparable wage. Therefore, the Appeals Board finds that the claimant's ability to earn a comparable wage has not been reduced because of his left shoulder injury. Pursuant to the Hughes formula, giving equal weight to each of these factors, twenty-five percent (25%) labor market loss and zero percent (0%) wage loss, the claimant is entitled to a twelve and one-half percent (12.5%) permanent partial general disability award based on work disability for his left shoulder injury. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(2) The Appeals Board finds that the Kansas Workers Compensation Fund is liable for all workers compensation benefits and costs awarded and incurred in relation to Docket No. 169,159, date of accident September 1, 1991, in regard to claimant's left shoulder injury.

Respondent has the burden to prove that it knowingly employed or retained a handicapped employee, in order to be relieved of liability for compensation awarded or be entitled to an apportionment of the award from the Kansas Workers Compensation Fund. K.S.A. 44-567(a)(1)(2),(b).

The date of accident stipulated to by the parties concerning the claimant's left shoulder injury and appropriate for determining workers compensation benefits is September 1, 1991. Medical records included in Dr. Garcia's deposition indicate that after the claimant's second right shoulder operation, he was returned to work on July 8, 1991, with restriction against using his right arm. Claimant established that he returned to the "tray former" job at that time and after about a month he injured his left shoulder. He continued on the "tray former" job with his symptoms increasing until the respondent sent him to Dr. Brown for treatment on January 10, 1992. He was then taken off the "tray former" job and placed on the temporary light-duty job of running papers. The claimant expressed his opinion that he injured his left shoulder because he could not use his right shoulder in performing the duties of a "tray former." Prior to performing this job with his left arm only, the claimant testified he had no previous problems with his left shoulder. Dr. Brown testified that due to the fact the claimant was using his left arm for the work of two, this would very likely have increased his impairment to his left shoulder to some extent. Dr. Dickerman established that the reason the claimant hurt his left shoulder was because he could not use his right shoulder due to injury. During Dr. Dickerman's deposition, he was asked on cross-examination the following question:

> Q.: "Doctor, this problem he is having with his left shoulder, is it your testimony that this wouldn't have occurred were it not for the problem he had with the right?"
>
> A: "Correct. I mean, are you asking me — there are hundreds of causes that can injure a shoulder, but from my history with him, I couldn't detect any other injury or any other underlining medical problem that would have caused it in him."

The record in this case clearly establishes that the respondent had knowledge of claimant's injury to his right shoulder and as a result of this injury the claimant is a handicapped employee. In addition, the claimant's testimony and the medical testimony firmly establish that but for the claimant's pre-existing right shoulder impairment he would not have incurred his left shoulder injury. K.S.A. 44-567(a)(1). Accordingly, it is the finding of the Appeals Board that all workers compensation benefits awarded and costs incurred in regard to the claimant's left shoulder injury shall be paid by the Kansas Workers Compensation Fund.

The Appeals Board further adopts and incorporates herein the findings in Docket No. 160,203 that are applicable to the claimant's left shoulder injury.

AWARD

Docket No. 160,203

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated December 22, 1993, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, William Smith, and against respondent, Excel Corporation, self insured, for an accidental injury sustained on October 8, 1988, and based upon an average weekly wage of $613.95.

Claimant is entitled to 15.71 weeks of temporary total disability at the rate of $263.00 per week or $4,131.73, followed by the payment of $257.87 per week until $95,868.27 is paid for a 63% permanent partial disability, making a total award of $100,000.00.

As of June 17, 1994, there would be due and owing the claimant, 15.71 weeks of temporary total disability compensation at $263.00 per week in the sum of $4,131.73 plus 281.29 weeks permanent partial disability compensation at $257.87 per week in the sum of $72,536.25 for a total due and owing of $76,667.98 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of $23,332.02 shall be paid at $257.87 per week until fully paid or further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum of $350.00 upon proper presentation of expenses.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorney's fees are approved subject to provisions of K.S.A. 44-536.

The claimant has not requested vocational rehabilitation services and therefore none are awarded.

The fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Underwood & Shane
Preliminary Hearing $27.60

Underwood & Shane Transcript of proceedings	$241.40
Todd Reporting Deposition of Dr. McQueen	Unknown
Todd Reporting Deposition of Mr. Molski	Unknown
Tri State Reporting Service Deposition of Dr. Garcia	Unknown
Underwood & Shane Deposition of Dr. Brown	$322.95
Karen Bittner & Associates Deposition of Dr. Dickerman	Unknown
Underwood & Shane Deposition of Susan Stephens	$288.00

Docket No. 169,519

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated December 22, 1993, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, William Smith, and against the respondent, Excel Corporation, self insured, for an accidental injury sustained on September 1, 1991, and based upon an average weekly wage of $331.07.

The claimant is entitled to 415 weeks of permanent partial disability weekly benefits at the rate of $27.59 per week or $11,449.85 for a 12.5% permanent partial general bodily disability.

As of June 17, 1994, there would be due and owing to the claimant 145.86 weeks of permanent partial general disability benefits at $27.59 per week in the sum of $4,024.28 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $7,425.57 shall be paid at $27.59 per week for 269.14 weeks or until further order by the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum of $350.00 upon proper presentation of expenses.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorney's fees are approved subject to the provision of K.S.A. 44-536.

The Kansas Workers Compensation Fund is liable for 100% of the total award.

Medical expenses that have been paid by the respondent for treatment of claimant's left shoulder injury in this docketed matter, shall be reimbursed to the respondent by the Kansas Workers Compensation Fund.

The fees necessary to defray the expenses of administration of the Workers Compensation Act have been assessed in Docket No. 160,203.

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James T. McIntyre, 329 S Topeka, Wichita, Kansas 67202-4309
David J. Rebein, PO Box 1147, Dodge City, Kansas 67801
Gary R. Hathaway, PO Box 527, Ulysses, Kansas 67880
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director